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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 173

JACK WALKER, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court dismissed the petition for writ of habeas corpus and discharged the order to show cause without opinion (R. 25–26). The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 109 F. (2d) 436.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 6, 1940 (R. 34–35) and a petition for rehearing was denied on March 7 (R. 35). The time within which to petition for writ of certiorari was extended 30 days from June 7, 1940, by

order of Mr. Justice Douglas dated May 14 (R. 35). The petition for a writ of certiorari was filed June 22, 1940 (R. 36) and was granted October 28, 1940 (R. 35). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner, indicted under U. S. C., Title 12, Section 588b for robbing a bank and putting in jeopardy the lives of its officers with a sawed-off shotgun, pleaded guilty and was sentenced to the penitentiary for 12 years. He filed this petition for habeas corpus, claiming that the judgment and sentence under which he is detained are void because he was denied the right to counsel, in violation of the Sixth Amendment. The District Court issued a rule to show cause why the writ should not issue. The respondent filed a return and the petitioner filed an answer traversing the return and alleging new facts.

The question presented is whether the facts alleged in the petition and the traverse and in the uncontradicted allegations of the return entitle the petitioner to the issuance of the writ. Three issues are involved:

(1) Whether the acceptance of the plea of guilty without the assignment of counsel violated the Sixth Amendment, when the court was not asked to assign counsel and the need for counsel did not otherwise appear.

(2) Whether it affirmatively appears that the right to counsel was not waived.

(3) Whether the judgment and sentence may be attacked on habeas corpus, when the petitioner does not show that he was prejudiced by the lack of counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rev. Stat., Sec. 751 (U. S. C., Title 28, Sec. 451), provides:

> The Supreme Court and the district courts shall have power to issue writs of habeas corpus.

Rev. Stat., Sec. 754 (U. S. C., Title 28, Sec. 454), provides:

> Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in

writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

Rev. Stat., Sec. 755 (U. S. C., Title 28, Sec. 455), provides:

> The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

Rev. Stat., Sec. 757 (U. S. C., Title 28, Sec. 457), provides:

> The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

Rev. Stat., Sec. 758 (U. S. C., Title 28, Sec. 458), provides:

> The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

Rev. Stat., Sec. 759 (U. S. C., Title 28, Sec. 459), provides:

> When the writ is returned, a day shall be set for the hearing of the cause, not exceeding

five days thereafter, unless the party petitioning requests a longer time.

Rev. Stat., Sec. 760 (U. S. C., Title 28, Sec. 460), provides:

> The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

Rev. Stat., Sec. 761 (U. S. C., Title 28, Sec. 461), provides:

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

STATEMENT

On March 28, 1939, petitioner filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus, alleging that he was unlawfully imprisoned in the United States Penitentiary at Alcatraz Island, in the custody of respondent (R. 2–4).

The petition and accompanying exhibits (R. 4, 7–12) showed the following facts: Petitioner and a codefendant, White, were indicted on April 14,

1936, in the United States District Court for the Northern District of Texas. The indictment (R. 7–9) charged, in two counts, that the defendants on July 1, 1935, robbed the National Bank of Bronte, Texas, and put in jeopardy the lives of its officers with a sawed-off shotgun. On April 28, 1936, the cause was regularly called for trial, the defendants appeared, and announced themselves ready, a jury was impanelled, and the indictment was read (R. 9–10). Thereupon, the petitioner pleaded guilty and his codefendant White not guilty (R. 2, 10). Evidence was introduced, argument of counsel [1] was heard, and the case was submitted to the jury, which returned a verdict finding petitioner "guilty as charged in the indictment and as pled by him," and also finding the codefendant guilty (R. 10). On May 1, petitioner appeared in court for sentence. The record recites that "being asked by the court if he had anything to say why the sentence of the law should not be pronounced upon him," he said nothing (R. 11); that the court "being of the opinion that the said Jack Walker, alias Joe C. White, alias Jack Miller, is guilty of the offense of violating Section 588–B, Title 12, U. S. C. Annotated, as charged in the Indictment and as pled by him," imposed a sentence

[1] While the record does not say so, it clearly appears that counsel represented the codefendant White and not the petitioner (R. 10, 22).

of imprisonment in the United States Penitentiary at Leavenworth for 12 years.

The petition alleged that the judgment and sentence thus pronounced are void because the petitioner "was deprived of his liberty without having the Assistance of Counsel, because he did not waive his lawful right to counsel, * * * the trial court did not ask * * * if he wanted counsel, or instruct him that he was entitled to counsel." It further alleged that the petitioner "did not know that he was entitled to counsel unless he had the money to pay for counsel, to that effect, and therefore he could not and did not competently waive his constitutional rights for counsel" (R. 3).

Upon the filing of the petition, the District Court issued an order calling upon the respondent to show cause why a writ of habeas corpus should not be issued (R. 5). The respondent filed a return which included the indictment, minutes of the trial, sentence, minutes of the sentence, the commitment and transfer to Alcatraz and also the prison record of commitment showing that the warden of the New Mexico State penitentiary has filed a detainer against the petitioner who is wanted to finish serving a life sentence (R. 16A). It included in addition the affidavits of Clyde O. Eastus, United States Attorney for the Northern District of Texas (R. 17–18), Joe H. Jones, Assistant United States Attorney for the same district (R. 18–20), and Elmer J. Reed, the United States

Probation Officer for the same district (R. 20-21) who at the time of petitioner's conviction was the deputy marshal.

The affidavit of the United States Attorney set forth the following facts: At the time of the commission of the offense charged, petitioner had escaped from the state penitentiary of New Mexico, where he was serving a life sentence. He was brought to the Northern District of Texas from the state penitentiary upon a writ of habeas corpus *ad prosequendum*. On the date of the trial the United States Attorney explained to the petitioner that he thought that "the judge would give him greater consideration if he was guilty by entering a plea of guilty" (R. 18). In response to questioning, the petitioner stated that he was guilty, that he was going to plead guilty, and that he did not want an attorney. He did not, however, wish to testify for the Government against his codefendant. At the trial of his codefendant, three employees of the First National Bank of Bronte "positively identified" petitioner as "one of the two men who entered this bank with guns and held it up" (R. 17). Two weeks after the sentence was imposed the United States Attorney received a letter from the petitioner on the stationery of the Leavenworth Penitentiary in which the petitioner expressed his satisfaction with and thanks for the treatment he had received (R. 18).

The affidavit of Assistant United States Attorney Jones corroborated that of United States At-

torney Eastus in all respects and added that the petitioner stated not only to the prosecuting officers but also in open court to the judge that he was not represented by counsel, did not desire counsel appointed for him, and was pleading guilty because he was guilty. It was under those circumstances that his plea of guilty was accepted (R. 19–20).

Probation Officer Reed deposed that on April 25 and 26, 1936, he transferred the petitioner from the New Mexico State Penitentiary to San Angelo, Texas. While making this trip the petitioner talked about the charge and said that he was guilty, that he was going to plead guilty, and that he had no intention of using a lawyer as he did not think that a lawyer would do him any good. He heard the petitioner make similar statements later to the prosecuting attorneys. After the plea and sentence, when he was returning the petitioner to jail, the petitioner said that he was "perfectly satisfied and that he felt he had got a break as he had traded them 99 years for 12" (R. 21).

Upon the filing of the return, the District Court appointed an attorney who prepared and signed an answer, which the petitioner verified. The answer specifically denied the statements in the affidavits to the effect that petitioner had said that he was guilty, that he was pleading guilty because he was guilty, and that he did not want an attorney (R. 22). It generally denied "the allegations contained in said affidavits to the effect that peti-

tioner made statements and admissions as set forth in said affidavits," except to the extent that they were specifically dealt with. It alleged that "petitioner had no information or belief sufficient to enable him to answer the allegations contained in said affidavits to the effect that petitioner wrote a letter from the United States Penitentiary at Leavenworth, Kansas, to said affiant or any of them, and basing his denial upon such lack of information or belief" denied that he had written the letter (R. 23). It also denied that the petitioner was guilty of the crime charged and that he was shown to be guilty by the evidence at the trial of his codefendant and alleged "that he is not guilty of the crimes charged in said indictment, or either of them."

In addition to making these denials the answer affirmatively alleged:

Petitioner first learned that he was to be prosecuted for the crimes charged in the indictment on April 26, 1936, when he was transferred from the New Mexico State Penitentiary to the place of trial. After he arrived at San Angelo he was approached by United States Attorney Eastus in the presence of Assistant United States Attorney Reed and other persons, and asked to plead guilty. He replied that he intended to plead not guilty. Thereupon the United States Attorney exhibited "certain pictures of the scene of said alleged crimes and by means of them and otherwise sought to persuade petitioner

that petitioner would be proved guilty at the trial." He refused to talk to the United States Attorney any further but shortly before the trial the United States Attorney came to him again and at this time petitioner asked for a continuance so that he could communicate with his relatives and try to obtain money to enable him to hire an attorney for his defense. The United States Attorney said that this was not possible and told the petitioner to plead guilty, warning him that otherwise he would be sentenced to double the term that he would receive if he pleaded guilty. Petitioner, who had no relatives, friends or acquaintances in or near San Angelo, Texas, other than his co-defendant, White, then asked the United States Attorney if he could talk to White or to the latter's attorney. This request was denied and "thereupon and because of said warning and in fear of a prison term of more than 12 years" he told the United States Attorney that he would plead guilty (R. 22–23).

In amplification of the statements made in the petition, the answer alleged that at no time was petitioner informed, or did he know or believe that he was entitled to the assistance of counsel without the money to pay for it; that he was without money; that he had attended school only through the fifth grade; that he was entirely unversed in law and was unable and unqualified to represent or act for himself; that he was not asked to waive his right to the assistance of counsel and that he did not in any

manner state or indicate that he waived or intended to waive his right (R. 23).

Finally, the answer incorporated a letter from the deputy clerk of the United States District Court for the Northern District of Texas which in reply to petitioner's inquiry stated that "there is no waiver on file showing you forfeited your right to have an attorney" and that the "writer was not in the courtroom when your case was called, and I, of course, do not know just what was said by you, but it has not been the practice or custom to appoint an attorney to defend unless a plea of not guilty is entered, and it is shown that the defendant is unable to employ an attorney" (R. 25).

The District Court after hearing the argument of counsel dismissed the petition for a writ of habeas corpus and discharged the order to show cause (R. 25–26). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was unanimously affirmed (R. 30–35).

The Circuit Court of Appeals held that the District Court properly issued a rule to show cause to explore petitioner's right to a writ of habeas corpus without disturbing his custody; that "the effect of the procedure is to require petitioner to submit whatever evidence he has with his petition or with his traverse to the return to the order to show cause"; that the only evidence supporting petitioner's contention that he did not waive his right to counsel consists of his own statements and it is not

contended that petitioner has any other evidence to submit; that the affidavits accompanying the return show that petitioner waived the right to counsel by stating that he did not want an attorney; and, finally, that the District Court was not required to believe the petitioner's denial that he had made this statement.

SUMMARY OF ARGUMENT

The Government concedes that petitioner's right to the issuance of the writ of habeas corpus must be tested by the allegations of the petition and traverse and the uncontradicted or irrefutable allegation of the return. We contend, however, that on these allegations no case was made for the issuance of the writ. We argue first, that when the petitioner appeared in court upon the arraignment and pleaded guilty he did not request the assistance of counsel and it was not otherwise apparent that he was in need of counsel; second, that the right to counsel was waived; and third, that the petitioner was not in need of counsel and, therefore, cannot challenge the judgment, at least on collateral attack.

I

Neither the Fifth nor the Sixth Amendment requires the court to assign counsel in the absence of a request, unless the defendant is in apparent need of aid. The decision in *Johnson* v. *Zerbst,* 304 U. S. 458, did not hold, and in view of the facts,

could not hold that the Sixth Amendment imposes an absolute duty on trial courts to offer to appoint counsel for all defendants who appear without representation, even though they do not request that an appointment be made. We regard it as crucial to the decision that the defendants who pleaded not guilty represented themselves at the trial; and that their need for counsel was therefore apparent to the trial court. *Powell* v. *Alabama,* 287 U. S. 45, rested on much narrower grounds. In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant, in the absence of a request or an apparent need, we accord to the Sixth Amendment at least as much scope as its history supports. Even less has been thought to suffice.

The distinction between a trial and a plea of guilty as evidence of the need for counsel is the implicit basis of the many decisions since *Johnson* v. *Zerbst* which treat a voluntary plea of guilty, made without requesting counsel, as a waiver of the right. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent, and if it is not, the Government conceded in *Frame* v. *Hudspeth,* 309 U. S. 632, that it can be set aside. In the present case the allegations of the traverse do not establish a request for counsel or show that the plea was not voluntarily made. The sentence conformed to the

petitioner's expectation and was fair. It is not alleged that he had a defense which he was induced to forego.

II

The determinative facts establish that the right to counsel was waived. A waiver does not always require "an intentional relinquishment or abandonment of a known right" (*Johnson* v. *Zerbst*, 304 U. S. at 464). Waiver may be implied as a matter of law when reasons of extrinsic policy justify the implication. Such reasons ordinarily exist when a defendant of mature age competently and voluntarily pleads guilty without requesting counsel.

The conclusion that there was a waiver may also be sustained on a narrower ground. Petitioner did not effectively deny that two weeks after sentence he wrote to the United States Attorney expressing his satisfaction with the result and his thanks. Even though a defendant did not know and was not informed of his right to counsel, a waiver must ordinarily exist when the defendant was satisfied with the result.

III

Petitioner has not shown that he actually needed counsel. The judgment cannot therefore be collaterally attacked. Even if the Sixth Amendment is interpreted to require that all defendants

have counsel upon assignment or knowingly waive the right, it does not necessarily follow that whenever this has not occurred the judgment is void and is open to collateral attack. The concept of jurisdictional defect is not inflexible and even the availability of habeas corpus may turn on judicial discretion.

It is not enough to show that the abstract right was denied; petitioner must establish that he was in actual need of counsel either in choosing his own course or in presenting his case. Prejudice may be presumed when a defendant, without legal competence is forced to represent himself at a trial and even when a request for counsel is denied. But it cannot be implied when a defendant understandingly pleads guilty to a valid indictment; and certainly not when he is a man of mature age who has previously been convicted of crime. In the present case, the only significant complaint is that petitioner did not know and was not told of his right to counsel. Standing alone, this is insufficient.

That prejudice, measured by actual need, should have weight in determining the extent to which convictions may be collaterally attacked under the Sixth Amendment is emphasized by the tremendous number of guilty pleas in both federal and state courts. The law of many of these states does not require that a defendant be informed of the right to counsel. While it is desirable to extend the

right to be informed and to enhance the opportunities of defendants to obtain competent advice, the result can be achieved by legislation, without the cost inherent in the retroactivity of constitutional adjudication.

ARGUMENT

INTRODUCTION

A. THE PROCEDURE IN THE DISTRICT COURT

The petitioner does not contend that it was error for the District Court to issue a rule to show cause upon the filing of the petition, instead of determining from the face of the petition, whether a case was made for the issuance of the writ. The procedure has been expressly sanctioned by the decisions of this Court (*Ex parte Yarbrough,* 110 U. S. 651, 653; see *Ex parte Royall,* 117 U. S. 241; *cf. Murdock* v. *Pollock,* 229 Fed. 392 (C. C. A. 8th); *Zahn* v. *Hudspeth,* 102 F. (2d) 759 (C. C. A. 10th), certiorari denied, 307 U. S. 642) and is supported by the analogous practice of issuing a rule upon an application for leave to file an original petition for habeas corpus. (*Mooney* v. *Holohan,* 294 U. S. 103, 111.) The petitioner concedes that if, upon this preliminary inquiry on rule to show cause, it appears that he is not, as a matter of law, entitled to relief, the petition may properly be dismissed. But he contends that the office of the preliminary procedure terminates if it develops an issue of fact upon the resolution of which the petitioner's right to the writ depends.

Hence, he argues, that the judgment of the District Court, the basis of which does not appear, cannot be sustained on the grounds relied upon by the Circuit Court of Appeals.

We think the contention is well founded. The statute (Rev. Stat. Sec. 755, U. S. C., Title 28, Sec. 455) specifically provides:

> The court * * * to whom such application is made shall forthwith award a writ of habeas corpus unless it appears from the petition itself that the party is not entitled thereto.

When a rule to show cause is issued its function is to substitute for the "petition itself" the larger body of data supplied by the return and the traverse, as the basis of determining whether the writ shall issue forthwith. So long as this determination is made on the basis of the allegations of the petition and the traverse and the uncontradicted or irrefutable [2] allegations of the return, the rule to show cause procedure implements that provided by the statute without depriving the petitioner of any substantial right (Cf. *Anderson* v. *Treat*, 172 U. S. 24, 31). But the procedure does deprive the petitioner of a substantial right if it may be employed without his consent to resolve a material issue of fact, without according the petitioner an opportunity to testify in his own behalf. For if the writ were issued, the statute would accord him that right.

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[2] That the record may not be contradicted by extrinsic proof is established by *Riddle* v. *Dyche*, 262 U. S. 333.

The statute provides that upon the issuance of the writ "the person making the return shall at the same time bring the body of the party before the judge who granted the writ" (Rev. Stat. Sec. 759, U. S. C., Title 28, Sec. 459), a day shall be set for a hearing (Rev. Stat. Sec. 760, U. S. C., Title 28, Sec. 460), and the "court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require" (Rev. Stat. Sec. 761, U. S. C., Title 28, Sec. 461). That the court is to proceed "in a summary way" implies that it shall proceed promptly, and since all "the freedom of equity procedure is thus prescribed" (*Storti* v. Massachusetts, 183 U. S. 138, 143) we think the statute confers an extensive discretion as to the necessary extent of the inquiry and the evidence which may be admitted. Within the scope of that discretion, we think the hearing may be curtailed, affidavits rather than depositions [3] may be received

[3] The English Habeas Corpus Act of 1816 specifically permits the use of affidavits. 56 Geo. III, c. 100, Sec. 3; *Ex parte Beeching*, 4 B. & C. 136; see *Bell Cox* v. *Hakes and Lord Penzance*, 15 App. Cas. 506 (1890). American courts have permitted the use of affidavits without statutory authorization. *United States* v. *Williams*, 6 F. (2d) 13 (E. D. La. 1925), affirmed, 12 F. (2d) 66 (C. C. A. 5th); *Christianson* v. *Zerbst*, 89 F. (2d) 40 (C. C. A. 10th); *Moore* v. *Hudspeth*, 110 F. 2d) 386 (C. C. A. 10th), certiorari denied, 60 Sup. Ct. 1105; *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9th), certiorari denied, 60 Sup. Ct. 898; *Spann* v. *Zerbst*, 97 F. (99

and the prisoner may be heard before a master rather than in open court.[4] But when the party imprisoned relies upon his own testimony as to controverted matters within his personal knowledge we think he is entitled to an opportunity to testify[5] in support of his assertions and that he may not be limited to the statements in his application, evaluated in the light of his *a priori* credibility. We cannot contend that where these statements are not inherently fantastic, the statute which provides for a determination "by hearing

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(2d) 336 (C. C. A. 5th); *Robertson* v. *Heath*, 132 Ga. 310; *People* v. *Chezaray*, 18 Wend. 637 (N. Y. S. C. 1839). And see Wigmore, *Evidence*, Secs. 4, 1710 (3rd ed.). In any event, confrontation is unnecessary. *Irvin* v. *Zerbst*, 97 F. (2d) 257 (C. C. A. 5th), certiorari denied, 305 U. S. 597; *Harrison* v. *King*, 111 F. (2d) 420 (C. C. A. 8th).

[4] Cf. *Case of the Hottentot Venus*, 13 East 195 (K. B. 1810); *In re Tsu Tse Mee*, 81 Fed. 702 (N. D. Calif.); *In re Leopold Meyer*, 146 App. Div. 626 (1911); *Gee Fook Sing* v. *United States*, 49 Fed. 146 (C. C. A. 9th; *Ex parte Sharp*, 33 F. Supp. 464, 465 (D. Kan.).

[5] While the Act of February 5, 1867, c. 28, 14 Stat. 385, 386, preceded the removal of the common law disability of the accused to testify (Act of March 16, 1878, 20 Stat. 30, U. S. C., Title 28, Sec. 632), habeas corpus has always been recognized as a civil rather than a criminal proceeding (*Holmes* v. *Jennison*, 14 Pet. 540, 562; *Ex parte Tom Tong*, 108 U. S. 556), and the removal of the disqualification of parties in civil cases was well under way by 1867. See *Wigmore on Evidence* (3rd ed.), Secs. 576, 577. Accordingly, even if the statute were to be accorded the narrowest historical interpretation, it could not be argued that the testimony of the prisoner was beyond the contemplation of the Act.

the testimony and arguments" can fairly be interpreted to deny the right to be heard, especially when such an interpretation would necessarily weaken the efficacy of the writ of habeas corpus as an instrument for the protection of personal liberty.[6] Accordingly, although the procedure of the lower court is sanctioned by cases in the Ninth and Tenth Circuits,[7] we would make no effort to

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[6] Before the decision of this Court in *Johnson* v. *Zerbst*, the prevailing practice in habeas corpus proceedings was to resolve material issues of fact after a hearing. See, e. g., *Tiberg* v. *Warren*, 192 F. 458 (C. C. A. 9th); *United States* v. *Fowlkes*, 53 Fed. 13 (C. C. A. 3d); *United States* v. *Walker Tea*, 47 Fed. 645 (N. D. Miss.); *Campbell* v. *Waite*, 88 Fed. 102 (C. C. A. 8th); *United States* v. *Fuellhart*, 106 F. 911 (W. D. Pa.); *Ex parte Crowley*, 268 F. 1016 (D. Mass.).

A similar result is suggested by the uniform limitation upon the issuance of summary judgments to cases which present no genuine issue of fact and where there is no issue of credibility. *Fidelity & Deposit Co. of Maryland* v. *United States*, 187 U. S. 315; *Cohen* v. *11 West 42d St., Inc.*, 115 F. (2d) 531 (C. C. A. 2d); *Hanna* v. *Mitchell*, 202 App. Div. 504 (1st Dept.), affirmed, 235 N. Y. 534; *Dwan* v. *Massarene*, 199 App. Div. 872 (1st Dept.).

In other instances, less persuasive, there is authority that affidavits may be used to resolve issues of fact. Thus, with motions for new trial (*Carman* v. *State*, 208 Ind. 297; *State* v. *Dodge*, 124 Me. 243; Ariz. Rev. Code, § 5098 (1928); Tex. Rev. Crim. Stat. (1925), Crim. Practice Act, §757) and motions to withdraw pleas of guilty. *State* v. *Richardson*, 98 Mo. 564; *State v. McKeen*, 56 P. (2d) ~~1027~~ 1076 (Wash.); *People* v. *Brown*, 54 Mich. 15.

[7] *Moore* v. *Hudspeth*, 110 F. (2d) 386 (C. C. A. 10th); *Creel* v. *Hudspeth*, 110 F. (2d) 762 (C. C. A. 10th); *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9th), certiorari denied,

sustain the decision below if the issues of fact upon which the petitioner was contradicted by the responding affiants were determinative of his right to the writ.

We do contend, however, that the District Court properly dismissed the petition because the facts alleged in the petition and traverse and in the uncontradicted and irrefutable assertions of the return state no case for the issuance of the writ.

B. THE DETERMINATIVE FACTS

The determinative facts are:

Petitioner, while serving a life sentence in the State Penitentiary of New Mexico, escaped. It was charged that after his escape he committed an armed bank robbery with an accomplice. He was returned to the state penitentiary and subsequently brought to San Angelo, Texas, to answer the charge of robbery. He first learned that he was to be prosecuted on this charge when he was transferred from the penitentiary on April 25 and 26. On April 28, he appeared in court for arraignment, pleaded guilty, and after the trial of his co-

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60 Sup. Ct. 898; *Sedorko* v. *Hudspeth*, 109 F. (2d) 475 (C. C. A. 10th); *Franzeen* v. *Johnson*, 111 F. (2d) 817 (C. C. A. 9th); *Forthoffer* v. *Swope*, 103 F. (2d) 707 (C. C. A. 9th); *Lewis* v. *Johnston*, 112 F. (2d) 451 (C. C. A. 9th); *Kelley* v. *Johnson*, 111 F. (2d) 613 (C. C. A. 9th); *Taylor* v. *Hudspeth*, 113 F. (2d) 825 (C. C. A. 10th); *Zahn* v. *Hudspeth*, 102 F. (2d) 759 (C. C. A. 10th), certiorari denied, 307 U. S. 642. Almost without exception, however, the same results could and should have been reached upon the analysis, advanced hereafter in the body of this brief.

defendant, who was represented by counsel, the jury convicted him on his plea and his codefendant on the evidence. On May 1, the Court, "being of the opinion" that he was guilty of the crime charged in the indictment " and as plead by him," sentenced him to twelve years in the penitentiary.

In the interval between his arrival in San Angelo on April 26 and his plea on April 28, he talked to the United States Attorney and the Assistant United States Attorney. After stating that he intended to plead not guilty, he was shown "certain pictures of the scene" of the alleged crime and the United States Attorney sought to persuade him that he would be proved guilty at the trial. The United States Attorney also asked him to testify against his codefendant. In a second interview shortly before the trial, petitioner asked for and was refused a continuance so that he could communicate with relatives and try to obtain money to hire an attorney for his defense. He also requested and was refused an opportunity to talk with his codefendant or his codefendant's attorney. The United States Attorney again told him to plead guilty and warned him that otherwise he would be sentenced to double the term that would be imposed if he pleaded guilty. In fear of this longer term, he said that he would plead guilty.

Petitioner had no money and did not know that he was entitled to counsel unless he had the money to pay a fee. Neither the prosecuting officers nor the Court told him of this right or offered to have

counsel assigned for his aid. He had little schooling, was unversed in the law, and did not intend to waive his right to counsel.

He denies that he has knowledge sufficient to form a belief whether or not he wrote a letter to the United States Attorney two weeks after the sentence expressing his satisfaction with the result and his thanks for what the United States Attorney did for him, and, therefore, denies that he wrote the letter. He also denies that the evidence of the trial of his co-defendant showed him to be guilty of the crime charged and asserts that he is, in fact innocent. But he does not allege what the evidence at the trial was or what the facts are, which could establish his innocence. Nor does he allege that he pleaded guilty under any misapprehension as to the nature of the charge or that it was involuntary in any other sense than that he was told and feared that he would be convicted and receive a longer sentence if he elected to stand trial.

We deny that these facts state a case for the issuance of the writ. We urge, first, that when the petitioner appeared in court upon the arraignment and pleaded guilty, he did not request the assistance of counsel and it was not otherwise apparent that he was in need of counsel; second, that the right of counsel was waived, and third, that the petitioner was not in actual need of counsel and therefore cannot challenge the judgment on collateral attack.

I

Neither the Fifth Nor the Sixth Amendment Requires the Court to Assign Counsel in the Absence of a Request, Unless the Defendant is in Apparent Need of Aid.

First: Petitioner contends that the judgment and sentence based upon his plea of guilty violate the Sixth Amendment and the due-process clause of the Fifth Amendment because he was not represented by counsel and was not offered the opportunity to have counsel assigned before his arraignment and plea. To sustain this contention he relies upon the recent decisions of this Court. In our view, these decisions do not hold that the Constitution requires that counsel be assigned unless there is a request for the aid of counsel, supported by a showing of indigence, or the need for counsel otherwise appears.

Petitioner relies primarily upon *Johnson* v. *Zerbst,* 304 U. S. 458. In that case the evidence upon a habeas corpus hearing established that the petitioner and his codefendant had been arrested on November 21, 1934, charged with feloniously uttering counterfeit money. They were bound over to await the action of the grand jury and, being unable to post bail, were held in jail. January 21, 1935, they were indicted and were informed of the indictment on January 23, when they were arraigned, pleaded "not guilty," were tried, convicted, and sentenced. Although they had been

represented by counsel at the preliminary hearing—who advised them to plead guilty (Record, *Johnson* v. *Zerbst,* No. 699, October Term, 1937, p. 44)—they dismissed him and were not subsequently represented. Upon the arraignment they stated, in response to the inquiry of the Court, that they did not have counsel; and being asked whether they were ready to proceed, they answered that they were (Record, *Johnson* v. *Zerbst,* pp. 5, 21, 27–30, 41, 42). Although they were uneducated men, without legal knowledge, they attempted to defend themselves and at least one of them briefly addressed the jury. Neither the Court nor the United States Attorney told them that they might have counsel assigned for their assistance, if they were unable to pay an attorney. Immediately after the trial, they were remanded to jail where they asked the jailer to call a lawyer for them but were not permitted to communicate with an attorney. Two days later they were taken to Atlanta and isolated for sixteen days during which they saw only officers of the institution. On May 15, they filed applications for appeal which were denied because filed too late. There was a conflict between their testimony and that of the United States Attorney as to whether at the arraignment and in the presence of the judge, they asked if they could be represented by counsel; and whether, as they said, the United States Attorney replied that in the State of South Carolina the

Court did not appoint counsel unless the defendant was charged with a capital crime (Record, *Johnson* v. *Zerbst*, pp. 41, 45, 21, 23, 24, 28, 33, 39). The conflict was not resolved by the District Court.

On this evidence the District Court concluded that the petitioners' constitutional right to counsel had been infringed but held that the judgment and sentence were not void and could not be attacked collaterally on habeas corpus. "It is unfortunate," the Court said, "if petitioners lost their right to a new trial through their ignorance or negligence, but such misfortune cannot give this court jurisdiction in a habeas corpus case to review and correct the errors complained of" (*Bridwell* v. *Aderhold*, 13 F. Supp. 253, 256 (N. D. Ga.)). The Circuit Court of Appeals affirmed.

On writ of certiorari the judgment was reversed by this Court. The decision held that if the petitioners were denied the right to counsel guaranteed by the Sixth Amendment, habeas corpus is an available remedy. In support of this conclusion it was said that if "this requirement of the Sixth Amendment is not complied with, the Court no longer has jurisdiction to proceed," and that to hold that the denial of counsel is a mere irregularity would deprive the petitioners who "did not possess the requisite skill or knowledge properly to conduct an appeal" of their only effective mode of obtaining relief. But the decision did not definitively chart the incidents and scope of the right to counsel which the

Sixth Amendment guarantees. This Court did not even acquiesce in the finding of the District Court that under the circumstances of the case the right to counsel was denied (304 U. S. at 459) for the case was remanded to that court to determine whether or not the right had been waived—an issue which had not been expressly resolved.

The *Johnson* case did not hold, and in view of the facts, could not hold that the Sixth Amendment imposes an absolute duty on trial courts to offer to appoint counsel for all defendants who appear without representation even though they do not request that an appointment be made. There was, as we have said, an unresolved issue on the evidence as to whether the defendants had not expressly requested and been refused counsel. A minimal interpretation of the decision might, therefore, urge that this was the crucial point and that the case did not involve the scope of the duty to assign counsel in the absence of a request, a problem which the opinion does not even discuss. But the Government has not taken this minimal view and does not urge it here. We do regard it as crucial that the defendants pleaded not guilty; that there was a trial in which they were not represented; that they attempted unsuccessfully to obtain counsel *after* the conviction and sentence; and that they lost their right to appeal because their papers were not filed in time. From the beginning of the case to the end, the defendants denied their guilt; and

when they appeared in court and expressed their determination to proceed, their need for counsel was as patent as it could possibly have been. That the trial court must, under such circumstances, respond to the patent need by offering to provide the assistance of counsel certainly does not imply that the Constitution requires a similar response when the defendant appears in court, announces his intention to make no defense and pleads guilty.

It is true that in the *Johnson* case the opinion contains the broad statements that the "Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive the accused of his life or liberty unless he has or waives the assistance of counsel," (304 U. S. at 463); that "if the accused * * * is not represented by counsel, and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty" (304 U. S. at 468); that the "constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel"; and, finally, that this "protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused" (304 U. S. at 465).

Taken literally, these statements undoubtedly would mean that the trial court is under a constitutional duty to offer to appoint counsel even though the accused makes no request and his need does not otherwise appear. We think, however, that it is fair to suggest that they were written "under the pressure of" the particular situation (cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 114) and that they cannot be taken literally as the precise measure of the constitutional right. For if they are to be taken literally, it is difficult to understand why it is that this Court reversed the judgment with directions to determine the issue of waiver rather than with directions to sustain the writ. There was no evidence that the petitioners had been informed of their constitutional right to have counsel assigned, that they knew of their right or that any offer had been made to obtain counsel for their assistance. Implicit in the determination, therefore, is the view that the right is subject to qualifications which were not fully described or, what is in substance the same thing, that a waiver may be found even though there was not "an intentional relinquishment or abandonment of a known right" (304 U. S. at 464). We think the whole opinion makes clear that the decision rests upon the apparent and indisputable need for counsel when defendants, asserting their innocence, proceed without legal knowledge, to try their own case, are convicted and forfeit their right to appeal.

Powell v. *Alabama,* 287 U. S. 45, upon which the petitioner also relies, certainly does not indicate that the Constitution requires the assignment of counsel in the absence of a request or of an apparent need. The tragic circumstances presented in that case need not be repeated in detail. It is enough to say that the defendants were charged with a capital crime; that they protested their innocence and were forced to immediate trial at a time when the degree of popular passion against them required reliance upon the military forces. This Court held, as one of the grounds of decision that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was * * * a denial of due process within the meaning of the Fourteenth Amendment" (287 U. S. at 71). The ultimate basis of the decision was that in "a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corrollary from the constitutional right to be heard by counsel" (287 U. S. at 72) or, as this Court said in *Palko* v. *Connecticut,* 302 U. S. 319, 327, "that in the particular situation * * * the benefit of counsel was essential to the substance of a hearing." *Avery* v. *Alabama,* 308 U. S. 444, in which the judgment of the state court was affirmed, does not extend the principal or alter the basis upon which it rests.

We do not deny that the principle of these "due process" decisions may properly be extended to

crimes which are not capital or that the Sixth Amendment may impose a broader duty to assign counsel than this Court has thus far found in the guarantee of due process of law. But we do contend that the principle of the "due process" cases is inapplicable to the petitioner who made no defense, did not seek to be heard, and even now does not allege that he desires to make a defense; and that not even the Sixth Amendment requires an offer to appoint counsel where counsel was not requested and the need for counsel was not otherwise made clear.[8]

Second: In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant, in the absence of a request or of an apparent need, we accord to the Sixth Amendment at least as much scope as its history supports.

Even less has been thought to suffice. After an extensive historical survey of the colonial practice and the early state constitutional provisions, this Court concluded in *Powell* v. *Alabama,* 287 U. S. 45, 68:

> What, then, does a hearing include. Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired *and provided* by the party asserting the right. [Italics ours.]

See also *Cooke* v. *United States,* 267 U. S. 517, 537.

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[8] *Frame* v. *Hudspeth*, 309 U. S. 632, upon which the petitioner also relies, rests upon other grounds and is discussed, *infra*, p. 41.

A similar view has been forcefully expressed by Judge Sibley, concurring in *Saylor* v. *Sanford,* 99 F. (2d) 605, 607 (C. C. A. 5th):

> The Constitution in saying that "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence" means that if he provides himself counsel the court shall allow counsel to assist and represent the accused—a right not accorded the accused in felony cases by the common law. It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel * * *. There are proposals pending before Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not required by the constitutional provision and have never been supposed to be.

See also *Sanford* v. *Robbins,* 115 F. (2d) 435 (C. C. A. 5th).

This conclusion finds support in the Act of April 30, 1790 (1 Stat. 112, 118, c. 9, Sec. 29: R. S. § 1034; U. S. C., Title 18, Sec. 563), enacted after the first ten amendments had been proposed by Congress (1 Stat. 97) which provided that in prosecutions for treason and other capital crimes the court before which the accused "is tried" is required "immediately upon his request to assign to such

person such counsel, not exceeding two, as such person shall desire." It is unlikely that the duty to assign would have been thus limited if the Sixth Amendment contemplated its existence in all cases. Not until 1892 was the statute supplemented by a provision primarily directed at civil causes that the court "may request any attorney of the court to represent such poor person" and then only "if it deems the cause worthy of a trial" (Act of July 20, 1892, c. 209, § 3, 27 Stat. 252).

The conclusion is also supported by the decisions of state courts, under constitutional provisions similar to the Sixth Amendment,[9] that the right to have counsel assigned is statutory rather than constitutional. See e. g. *People* v. *Williams*, 225 Mich. 133, 137–138; *Reed* v. *State*, 143 Miss. 686, 689; *State* v. *Sweeney*, 48 S. D. 248, 251; *Sowells* v. *State*, 99 Tex. Cr. App. 465, 468; *Pardee* v. *Salt Lake County*, 39 Utah 482, 488; *State* v. *Gomez*, 89 Vt. 490, 496.

It is supported, finally, by the absence of persuasive affirmative evidence of a constitutional duty to assign. For after exhaustive research, the petitioner is able to point only to the English Treason Act of 1695 (Petitioner's Brief, p. 22) providing for assignment *on request;* and the instructions from three of the constituencies of the delegates who drew the Declaration of the Rights of Man (Petitioner's Brief, p. 26). The exceptional nature of the Treason

[9] These provisions are set forth in Appendix A, *infra*, pp. 50–52.

Act was recognized by this Court in the *Powell* case (287 U. S. at 60) and it is not without interest that the procedure it prescribed was to some extent copied by the Act of April 30, 1790, *supra*, p. 33, with an extension to other capital cases only. With respect to the "cahiers" from La Rochelle, Paris, and Vaunes, it is enough to point to the obvious fact that what was thought desirable in an inquisitorial system would not necessarily have commended itself to the architects of an accusatorial system had they known of it—and there is no evidence that they did.

If the bare historical record persuades that the Sixth Amendment contemplated the assignment of counsel, we think it clear that it does not persuade that assignment was contemplated without request. Even the Treason Act of 1695, upon which the petitioner so strongly relies, called for a request, and, except in Pennsylvania, those state courts which have pointed to their constitutions as well as to inconclusive statutes [10] in finding a duty to assign, have explicitly required a request. See, e. g. *Weatherford* v. *State*, 76 Fla. 219; *Bethune* v. *State*, 26 Ala. App. 72, certiorari denied 228 Ala. 422; *Holland* v. *Comm.* 241 Ky. 813, 817; *State* v. *Satcher*, 124 La. 1015, 1019; *State* v. *Steelman*, 318

[10] In only a minority of the states do the statutes specifically provide that when a defendant appears for arraignment, he must be advised that it is his right to be assisted by counsel. American Law Institute, Code of Criminal Procedure, Official Draft (1930) 630.

Mo. 628, 631–632; *State* v. *Raney*, 63 N. J. L. 363, 365; *Ex parte Rodriguez*, 118 Tex. Cr. App. 179, 181; *State* v. *Yoes*, 67 W. Va. 546, 547.

Most of the rights conferred by the Constitution must be claimed before they can be denied. The Court is not obliged to advise that the privilege against self-incrimination would justify a refusal to answer, even when the consequences of the answer are damaging indeed (see *Wilson* v. *United States*, 162 U. S. 613; *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618 (C. C. A. 2d) or that the accused has a right to a speedy trial (*Worthington* v. *United States*, 1 F. (2d) 154 (C. C. A. 7th); *Phillips* v. *United States*, 201 Fed. 259 (C. C. A. 8th)).

We think that the framers did not doubt that if men were granted rights by the organic law they would have the wit and the fortitude to assert them. The thought that more may sometimes be needed to bring potential rights to the fruition of enjoyment, while the basis of much modern legislation, is not a product of the Eighteenth Century.

Third: In our view the decision in *Johnson* v. *Zerbst* goes beyond the historical record and implies that the Sixth Amendment imposes a duty to assign counsel. But we do not think that it imposes such a duty in the absence of a request or of other circumstances which serve the function of a request in making the need clear. Such circumstances may well be thought to exist in any case in

which the defendant asserts his innocence and is required to stand trial without the assistance of counsel. But they do not exist where, as in the case at bar, the defendant, upon arraignment, pleads guilty to an unquestionably valid indictment and is sentenced by a court which is satisfied of his actual guilt.

The distinction between a trial and a plea of guilty as evidence of the need for counsel is the implicit basis of the many decisions since *Johnson* v. *Zerbst* which treat a voluntary plea of guilty, made without requesting counsel, as a waiver of the right. See, e. g., *Cundiff* v. *Nicholson*, 107 F. (2d) 162 (C. C. A. 4th); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9th); *Williams* v. *Sanford*, 110 F. (2d) 527, (C. C. A. 5th), certiorari denied, 310 U. S. 643.[11] The distinction has also been supported by emphasizing that it is "for his defence" that the Constitution guarantees the right to counsel; and a defendant who pleads guilty makes no defense. See *Cooke* v. *Swope*, 28 F. Supp. 492, *supra*; *Parker* v.

[11] Accord: *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9th), certiorari denied, 310 U. S. 624; *Franzeen* v. *Johnston*, 111 F. (2d) 817, 820 (C. C. A. 9th); *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10th), certiorari denied, 308 U. S. 553; *McCoy* v. *Hudspeth*, 106 F. (2d) 810, 811 (C. C. A. 10th); *Wilson* v. *Hudspeth*, 106 F. (2d) 812, 813 (C. C. A. 10th); *Pers* v. *Hudspeth*, 110 F. (2d) 812, 813 (C. C. A. 10th); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 471 (C. C. A. 10th); *Erwin* v. *Sanford*, 27 F. Supp. 892 (D. C. Ga.).

829, 830) *Johnson,* 29 F. Supp. ~~828, 829~~ (N. D. Cal.); *State* v. *Murphy,* 87 N. J. L. 515, 530; *State* v. *Heyer,* 89 N. J. L. 187. In Pennsylvania, the decisions requiring the accused to be advised of his right to counsel—in spite of the absence of a statute so providing (*Commonwealth* v. *Cohen,* 123 Pa. Super. 5; *Commonwealth* v. *Valerio,* 118 Pa. Super. 34)—have recently been held inapplicable to a defendant who pleads guilty. *Commonwealth ex rel. Curtis* v. *Ashe,* 139 Pa. Super. 417; *Commonwealth ex rel. Campbell* v. *Ashe,* 15 Atl. (2d) 409. The same distinction has been taken in other states in the application of the assignment statutes. See, e. g., *State* v. *Murphy, supra; State* v. *Heyer, supra; People* v. *Williams,* 225 Mich. 133. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent and if the plea is involuntary or incompetent the Government conceded in *Frame* v. *Hudspeth,* 309 U. S. 632, that it can be set aside. See also *Sanders* v. *Allen,* 100 F. (2d) 717 (App. D. C.).

Fourth: On the determinative facts of the present case, the petitioner did not request counsel when he appeared upon the arraignment and nothing occurred in court to indicate an apparent need. Accordingly, we contend that the petitioner's rights were not infringed by failing to assign counsel or offering to do so.

The petitioner may urge in reply that the alleged occurrences before arraignment point to a need for

counsel which the United States Attorney should have called to the attention of the court; and that his rights should be considered as *if* the facts were before the Court. But even if the facts alleged had been before the Court, we think that neither a request nor a need would have been shown. That the petitioner had asked for a continuance in order to communicate with relatives in the effort to obtain funds to employ counsel would be without significance if he did not persist in the request; and by the time he came into court he had determined to plead guilty.[12] By the same token, his earlier desire to speak to his codefendant or to his co-defendant's attorney was hardly significant when, on his appearance in court, both were present and presumably continued to be during the co-defendant's trial. Moreover, he does not allege that he desired to speak to them with reference to his own defense rather than with regard to the United States Attorney's effort to induce him to testify for the Government—a possibility which is strongly suggested by the fact that he asked to see *either* his co-defendant or his attorney. If the right to counsel were denied at first and subsequently granted, the petitioner could not complain. *Saylor* v. *San-*

[12] Moreover, almost a year had elapsed between the time of the robbery charged in the indictment and his removal to stand trial. Although the petitioner alleges that he first learned that he was "to be prosecuted" on or about April 26, 1936, he does not assert that he had not previously learned of the *charges* against him (R. 22).

ford, 99 F. (2d) 605 (C. C. A. 5th). For similar reasons, the denial of his earlier requests would be of no significance if he had freely decided to plead guilty.

There remains, therefore, only the allegations that before he decided to plead guilty the United States Attorney showed him pictures of the scene of the crime, attempted to persuade him that he would be convicted, and "warned" him that, if he were, he would receive twice as severe a sentence as if he pleaded guilty, and that, because of this warning "and in fear of a prison term of more than 12 years," he agreed to plead guilty.

These allegations do not show that the plea was involuntary or establish a need for counsel, in any significant sense, at the time of the arraignment. In telling a defendant that he will receive more favorable consideration upon sentence if he pleads guilty than if he is convicted after a trial, a prosecuting officer states one of the facts of life which it is not to the disadvantage of a defendant to know. To call the statement a "warning" is to give it a bad name, but not to render its utterance inappropriate. The thought that such considerations might have weight with the sentencing judge can hardly have come as a surprise to the petitioner, who was already under a life sentence in a state penitentiary. That a plea of guilty was induced by a prosecutor's promise of leniency is not even a

ground for withdrawing the plea,[13] unless the expectations engendered are defeated by the court;[14] and if the prosecutor's statement is only a prediction it may not be withdrawn at all.[15] In the present case the sentence conformed precisely to the petitioner's expectations. It is not and could not be alleged that the sentence was excessive. It is not alleged that the petitioner had a defense which he was induced not to make. It is not even explicitly alleged that he desires now to put the Government to its proof.

Fifth: Petitioner cites *Frame's* case, 309 U. S. 632, in support of the contention that his plea of guilty does not affect his right to the writ (Brief, pp. 18–19). That decision is wholly consistent with the position we take here. The petition for habeas corpus alleged that the petitioner had pleaded guilty without the assistance of counsel at a time when he was under an adjudication of insanity and was in fact mentally incompetent. Upon the basis of the petition and the answer the

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[13] See *United States* v. *Bayaud*, 23 Fed. 721 (S. D. N. Y.); *Kidd* v. *Commonwealth*, 255 Ky. 498; *United States* v. *Denniston*, 89 F. (2d) 696 (C. C. A. 2d), certiorari denied, 301 U. S. 709.

[14] See *Kercheval* v. *United States*, 274 U. S. 220; *Myers* v. *State*, 115 Ind. 554; *State* v. *Stephens*, 71 Mo. 535; *Griffin* v. *State*, 12 Ga. App. 615; *Morgan* v. *State*, 33 Okla. Cr. 277; *State* v. *District Court*, 81 Mont. 495; *Rex* v. *Ah Tom* [1928], 2 D. L. R. 748.

[15] *State* v. *Reininghaus*, 43 Ia. 149; *State* v. *Wyckoff*, 107 N. W. 420 (Ia.), 1906.

District Court found that the petitioner had voluntarily, intelligently, and competently entered his plea of guilty. The Circuit Court of Appeals affirmed on the ground that the finding of the District Court was supported by substantial evidence, with one judge dissenting on a petition for rehearing. Upon a petition for a writ of certiorari we took the view that the statements in the record and in the answering affidavits were insufficient to show that the petitioner, who by virtue of the adjudication of insanity was presumptively insane at the time of the plea, was in fact mentally competent at that time. With the consent of the Government this Court reversed the judgment and remanded the cause to the District Court "for the purpose of making a full inquiry into the mental status of petitioner at the time he entered the pleas of guilty."

It is obvious that the disposition rested upon the ground that if the allegations of the petition were sustained, the petitioner was incompetent to plead. Cf. *Sanders* v. *Allen,* 100 F. (2d) 717 (App. D. C.). The same result follows in jurisdictions where the accused is not entitled to the assignment of counsel in non-capital cases even upon request. (Compare *Reed* v. *State,* 143 Miss. 686, 689, with *Deloach* v. *State,* 77 Miss. 691.)[16]

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[16] Compare *Weatherford* v. *State*, 76 Fla. 219, with *Eckles* v. *State*, 180 So. 764 (Fla.), in a jurisdiction where there is ordinarily no right to assignment in the absence of a request.

It is not alleged in the present case that the petitioner pleaded guilty without full understanding of the nature of the charge and the implications of the plea; and the recitations in the minutes of sentence that he remained silent when asked if there was any reason why sentence should not be pronounced [17] and that the trial court was of the opinion that the petitioner was guilty of the crimes charged (R. 11) carry assurance that the court was satisfied that the plea was competently and voluntarily made.

II

The Determinative Facts Establish That the Right to Counsel Was Waived

First: What has been said to support the contention that the Sixth Amendment confers no right to have counsel appointed in the absence of a request or an apparent need may be repeated to sustain the view that even if the right is conferred, the petitioner's voluntary plea of guilty constituted a waiver as a matter of law. A waiver may be implied as a matter of law when reasons of extrinsic policy justify the implication. Such reasons are amply furnished in the arguments that have heretofore been made. This, indeed, is the mode of analysis adopted by the Circuit Courts in the decisions to which we have referred (*supra*, p. 37). To be sure, this analysis in terms of waiver cannot

[17] *Cf. Rex* v. *Richmond*, 39 D. L. R. 117 (1918).

be sustained if a waiver always requires "an intentional relinquishment or abandonment of a known right" (*Johnson* v. *Zerbst,* 304 U. S. at 464). But for the reasons already stated we do not believe that this is its only meaning (*supra,* p. 30).

Second: The conclusion that there was a waiver may also be sustained on a narrower ground. A waiver must exist whenever the defendant is satisfied with the result, even though he did not know and was not told of his right to counsel. Unless this is so, the doctrine of *Johnson* v. *Zerbst* would lead to denying that those acquitted without counsel have "been validly acquitted and cannot be tried again." Sibley, J. in *Sanford* v. *Robbins,* 115 F. (2d) 435.

In the present case there is more than the plea of guilty and the failure to seek to withdraw it to indicate that the petitioner was satisfied with the result. The United States Attorney and the Assistant United States Attorney both stated in their affidavits that two weeks after his sentence the petitioner wrote expressing his thanks and his satisfaction with the result. In his traverse the petitioner stated that he had "no information or belief sufficient to enable him to answer" these allegations and "basing his denial upon such lack of information or belief," he denied that he had written the letter (R. 23). Since the petitioner must have known whether or not he wrote such a letter, his denial of information and belief was a

patently sham denial. It can, therefore, be disregarded. (See *Local 167* v. *United States,* 291 U. S. 293; *Dahlstrom* v. *Gemunder,* 198 N. Y. 449, 454; *Hanna* v. *Mitchell,* 202 App. Div. 504, 517–518, affirmed 235 N. Y. 534; *Wallace* v. *Bacon,* 86 Fed. 553 (S. D. Calif.); cf. *Kosztelnik* v. *Bethlehem Iron Co.,* 91 Fed. 606 (E. D. N. Y.).) Thus, the case stands on the rule to show cause with an uncontroverted allegation that petitioner, who made no effort to withdraw his plea of guilty, expressed his complete satisfaction with the judgment and sentence of the court. There is, moreover, no allegation in the petition or in the traverse that the petitioner was actually dissatisfied with the result. Under these circumstances, the determinative facts fail to show that the right to counsel was not waived. More than this, they establish that it was waived.

In *Johnson* v. *Zerbst,* this Court said that the burden of proving that there was no waiver is upon the petitioner who seeks collaterally to attack a presumptively valid judgment of a court. We agree with the petitioner's statement (Brief, p. 20) that burden of proof is irrelevant if the application for habeas corpus alleges facts which show as a matter of law that the right was denied and that no waiver occurred. But it is highly relevant insofar as it imposes the duty upon the petitioner of establishing on the rule to show cause facts which, if proved, would clearly show that there was no waiver. That burden was not sustained in the present case.

III

Petitioner Has Not Shown That He Actually Needed Counsel. The Judgment Cannot Therefore Be Collaterally Attacked

First: Even if the Sixth Amendment is interpreted, as petitioner contends, to require that all defendants have counsel upon arraignment or knowingly waive the right, we do not think it necessarily follows that whenever this has not occurred the judgment is void and is open to collateral attack. The right to counsel is guaranteed because it meets a need, not for its own sake. Accordingly, we contend that it is not enough to show that the abstract right was denied; it must also be shown that the need existed which constitutes the justification of the right. To make such a showing a petitioner must establish that he suffered from the lack of counsel either in choosing his own course or in presenting his case. Such prejudice may be readily presumed when, as in *Johnson* v. *Zerbst, supra,* a defendant, without legal competence is forced to trial without aid. It may also be readily inferred when a request for counsel was denied, since a defendant who claims the aid must usually have responded to a felt need. But it cannot be implied when a defendant understandingly pleads guilty to a valid indictment charging a serious offense, and certainly not when he is a man of mature age who has previously been convicted of crime. In such a case a conviction has not resulted from

the defendant's "own ignorance of his legal and constitutional rights" (*Johnson* v. *Zerbst*, 304 U. S. at 465). Counsel "had they been assigned could have entered no other plea than that which he himself entered, if they had dealt honestly with him and with the court." (Parker, J. in *Cundiff* v. *Nicholson*, 107 F. (2d) 162, 164 (C. C. A. 5th)). If a substantial showing of innocence were made, it might be argued that counsel could have protected the accused against his own timidity or folly. But there is no such showing here. Nor is it shown that the sentence was excessive or that facts which might have affected the sentence were not brought to the attention of the court. When all the facts are marshalled the only significant complaint is that originally alleged in the petition—that petitioner did not know and was not told of his right to counsel. We do not think this serves to bring the case within the reason of a rule which found its primary authority in decisions involving a trial which is only a sham (*Moore* v. *Dempsey*, 261 U. S. 86; cf. *Frank* v. *Mangum*, 237 U. S. 309; *Mooney* v. *Holohan*, 294 U. S. 103). This distinction between a trial which is unfair and one which is void[18] indicates that the concept of jurisdictional defect is not impervious to differences of degree. Even

[18] Compare the memorandum of Mr. Justice Holmes denying application for habeas corpus in *Sacco and Vanzetti* v. *Massachusetts*, printed in *The Sacco-Vanzetti Case* (1929), V, pp. 5516–6617.

the availability of habeas corpus may turn on judicial discretion. Cf. *Bowen* v. *Johnston,* 306 U. S. 19.[19] In the absence of genuine prejudice, we think the opportunity to apply for withdrawal of a plea of guilty, within the time provided by Rule II (4) of the Criminal Appeals Rules is an adequate remedy. Cf. *United States* v. *Norris,* 281 U. S. 619.

Second: That such consideration should have weight in determining the extent to which judgments of conviction should be subject to collateral attack is strikingly emphasized by the fact that in 1938 and 1939 more than 70,000 pleas of guilty were filed in federal courts and 38,000 for the year ending June 30, 1940. In 1938 more than 50,000 pleas of guilty were filed in the courts of 26 states,[20] in many of which the defendants were not required under state law to be informed of the right to counsel. The Government agrees that the desirable practice is that provided by the statutes of some states requiring an offer to appoint counsel upon arraignment, even on a plea of guilty.[21] In March 1937 the Attorney Gen-

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[19] See also *Harlan* v. *McGourin,* 218 U. S. 442; *Knewel* v. *Egan,* 268 U. S. 442; *McNally* v. *Hill,* 293 U. S. 131, 138–139.

[20] This data was made available to the Department by Dr. C. C. Van Vechter, Chief of the Census Bureau, Department of Commerce. The number of pleas in the federal courts for the fiscal year ending June 1940 is taken from Annual Report of the Director of the Administrative office of the United States Courts (1940), p. 85.

[21] See, e. g., Minn. Gen. Stat. (1923) § 10667. But cf. *State* v. *McDonnell,* 165 Minn. 423, 426.

eral urged that counsel be appointed "in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense" (Circular No. 2946); and for several years legislation has been furthered to establish a system of public defenders.[22] Such reforms can be achieved legislatively without the retroactivity of constitutional adjudication. The present case suggests that if retroactivity is essential (cf. *Montgomery Ward and Co.* v. *Duncan*, No. 30, October Term, 1940) the reforms will be achieved at a cost which may offset the gain.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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JANUARY 1941.

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[22] See Annual Report of the Attorney General (1940), pp. 7–8.

APPENDIX A

Right to Counsel Clauses in State Constitutions

Alabama (1901), Art. 1, Sec. 6: "right to be heard by himself and counsel, or either"; Arizona (1912), Art. 2, Sec. 24: "right to appear and defend in person, and by counsel"; Arkansas (1874), Art. 2, Sec. 10: "to be heard by himself and his counsel"; California (1879), Art. 1, Sec. 13: "to appear and defend, in person and with counsel"; Colorado (1876), Art. 2, Sec. 16: "to appear and defend in person and by counsel"; Connecticut (1818), Art. 1, Sec. 9: "to be heard by himself and by counsel"; Delaware (1897), Art. 1, Sec. 7: "to be heard by himself and his counsel"; Florida (1887), Preamble, Sec. 11: "shall be heard by himself or counsel or both"; Georgia (1877), Art. 1, Par. 5: "shall have the privilege and benefit of counsel"; Idaho (1890), Art. 1, Sec. 13: "to appear and defend in person and with counsel"; Illinois (1870), Art. 2, Sec. 9: "to appear and defend in person and by counsel"; Indiana (1851), Art. 1, Sec. 13: "to be heard by himself and counsel"; Iowa (1857), Art. 1, Sec. 10: "to have the assistance of counsel"; Kansas (1861), Sec. 10: "to appear and defend in person or by counsel"; Kentucky (1891), Sec. 11: "to be heard by himself and counsel"; Louisiana (1921), Art. 1, Sec. 9: "to have the assistance of counsel"; Maine (1820), Art. 1, Sec. 6: "to be heard by himself and his counsel or either at his election"; Maryland (1867), Art. 21: "to be al-

lowed counsel"; Massachusetts (1790), "to be fully heard in his defense by himself or his counsel at his election"; Michigan (1909), Art. 2, Sec. 19: "to have the assistance of counsel for his defense"; Minnesota (1857), Art. 1, Sec. 6: "to have the assistance of counsel in his defense"; Mississippi (1890), Art. 3, Sec. 26: "to be heard by himself or counsel or both"; Missouri (1875), Art. 2, Sec. 22: "to appear and defend, in person and by counsel"; Montana (1889), Art. 3, Sec. 16: "to appear and defend in person and by counsel"; Nebraska (1875), Art. 1, Sec. 11: "to appear and defend in person or by counsel"; Nevada (1864), Art. 1, Sec. 8: "to appear and defend in person and with counsel as in civil actions"; New Hampshire (1784), Part First, Art. Fifteenth: "to be fully heard in his defense by himself and counsel"; New Jersey (1844), Art. 1, Sec. 8: "to have the assistance of counsel in his defence"; New Mexico (1912), Art. 2, Sec. 14: "to appear and defend himself in person, and by counsel"; New York (1895), Art. 1, Sec. 6: "to appear and defend in person and with counsel as in civil actions"; North Carolina (1876), Art. 1, Sec. 11: "to have counsel for his defense"; North Dakota (1889), Art. 1, Sec. 13: "to appear and defend in person and with counsel"; Ohio (1851), Art. 1, Sec. 10: "to appear and defend in person and with counsel"; Oklahoma (1907), Art. 2, Sec. 20: "right to be heard by himself and counsel"; Oregon (1859), Art. 1, Sec. 11: "to be heard by himself and counsel"; Pennsylvania (1874), Art. 1, Sec. 9: "to be heard by himself and his counsel"; Rhode Island (1843), Art. 1, Sec. 10: "to have the assistance of counsel in his defense"; South Caro-

lina (1895), Art. 1, Sec. 18: "to be fully heard in his defense by himself or by his counsel or by both"; South Dakota (1889), Art. 6, Sec. 7: "to defend in person and by counsel"; Tennessee (1870), Art. 1, Sec. 9: "to be heard by himself and his counsel"; Texas (1876), Art. 1, Sec. 10: "the right of being heard by himself or counsel or both": Utah (1895), Art. 1, Sec. 12: "to appear and defend in person and by counsel"; Vermont (1793), Chap. 1, Art. 10: "to be heard by himself and his counsel"; Washington (1889), Art. 1, Sec. 22: "to appear and defend in person or by counsel"; West Virginia (1872), Art. 3, Sec. 14: "shall have the assistance of counsel"; Wisconsin (1848), Art. 1, Sec. 7: "to be heard by himself and counsel"; Wisconsin (1889), Art. 1, Sec. 10: "to defend in person and by counsel."

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SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1940.

Jack Walker, Petitioner, *vs.* James A. Johnston, Warden, United States Penitentiary, Alcatraz, California.	On ~~petition for~~ Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 10, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions of practice touching the issue of the writ of *habeas corpus*. We accordingly granted certiorari *in forma pauperis*, and appointed counsel for the petitioner to insure adequate presentation at our bar.

The petitioner, who is confined in the Federal prison at Alcatraz, California, under sentence and commitment of the District Court for Northern Texas upon a plea of guilty to an indictment charging armed robbery of a national bank, sought *habeas corpus* in the District Court for Northern California. His petition recites that he was indicted in the District Court for Northern Texas March 9, 1936; that the cause came on for trial April 28, 1936, and he pleaded guilty; that he was sentenced May 1, 1936, to twelve years' imprisonment, was committed to the penitentiary at Leavenworth, Kansas, May 4, 1936, and is now confined at Alcatraz. The petition alleges that at trial the petitioner was without the assistance of counsel; that he did not waive his right to counsel; that the court did not inquire whether he desired counsel or instruct him that he was entitled to counsel; that he did not know he was so entitled if he had no money to pay an attorney; and that the judgment of conviction is void, as he was deprived of the assistance of counsel for his defence in violation of the Sixth Amendment of the Constitution. The prayer is that the writ issue and that he be released from custody.

The court issued an order to show cause addressed to the warden of the penitentiary. That officer filed a return showing that he

held the prisoner under a commitment issued by the Texas District Court and a transfer from Leavenworth to Alcatraz ordered by the Director of the Bureau of Prisons of the Department of Justice. Attached to the return were certified copies of the indictment, minute entries, sentence, and commitment, and docket entries in the cause, transfer order, and record of commitment. Also attached were affidavits of the United States Attorney, the Assistant United States Attorney, and the Probation Officer (formerly a deputy marshal) of the Northern District of Texas. These affiants, or some of them, deposed to the following effect: The petitioner was jointly indicted with one White, who pleaded not guilty, was tried, convicted, and sentenced; the petitioner had no counsel as he entered a plea of guilty. At the time of the commission of the offense for which the petitioner was indicted he was an escaped convict from the State Penitentiary of New Mexico and was brought thence for trial. On the day of the trial, the marshal brought him to the Federal building where the District Attorney talked to him; asked him whether he was guilty and he stated he was; asked him if he was going to plead guilty and he stated he was; asked him whether he had a lawyer and he stated he did not want an attorney as he thought an attorney would be of no value to him. The District Attorney explained to the petitioner that he thought the judge would give him greater consideration, if he was guilty, on his entering a plea of guilty. The petitioner was told his interviewers believed that if he would tell the judge the truth and testify in the case as to his accomplices that fact would be considered by the judge in passing sentence. The petitioner stated he would enter a plea of guilty but would not testify. He refused to say whether the co-defendant White was with him at the time of the robbery and said that he would prefer not to make a statement with respect to other facts in the case. One affiant stated his belief that petitioner told the judge in open court that he had no counsel and did not desire any as he was guilty and intended to plead guilty. Three witnesses identified the petitioner as being one of the men who entered the bank and there was no question of his guilt. After sentence, petitioner expressed his satisfaction at the length of sentence imposed. Some time later a letter was received from the petitioner thanking the District Attorney for what he had done for him.

The petitioner answered, denying that he had stated to one or more of the affiants, or in the presence of one or more of them, that he was guilty or that he intended to plead guilty; that he did not want an attorney or felt that an attorney would be of no value to him. He alleged that he first learned he was to be prosecuted for the offense in question about April 26, 1936, when a deputy marshal took him from New Mexico to Texas; that, prior to trial, the District Attorney, in the presence of the deputy marshal, asked him to plead guilty and he replied that he intended to plead not guilty, whereupon the District Attorney exhibited to him pictures of the scene of the alleged crime and, by means of them and otherwise, sought to persuade him that he would be proved guilty; that the petitioner refused to talk further with the District Attorney at that time; that the District Attorney again visited him and the petitioner then requested that the trial be continued so that he could communicate with his relatives and try to obtain money to enable him to hire an attorney for his defense, but that the District Attorney advised him this was not possible and told him to plead guilty, warning him that he would be sentenced to twice as great a term if he did not so plead; that the petitioner had no relatives or friends near the scene of the trial other than his co-defendant White. He alleged that he requested the District Attorney to be permitted to talk to White or White's attorney, but the request was refused. In view of the District Attorney's warning, and in fear of a heavy prison term, he told the District Attorney he would plead guilty. The answer alleges that petitioner has no information and belief sufficient to enable him to answer the statement concerning his letter claimed to have been sent from the penitentiary and, therefore, denies the fact; denies that the petitioner stated to the judge that he did not desire counsel appointed for him or that he was pleading guilty because he was guilty; alleges that at no time was petitioner informed, did he know or believe that he was entitled to the assistance of counsel for his defense, and that at no time did anyone ask him if he desired the assistance of counsel nor did anyone offer to procure such assistance for him; avers that he was without money to pay for counsel and believed he could not obtain the assistance of counsel without money to pay a lawyer; asserts that he attended school to the fifth grade and had had no further schooling or education, was entirely unversed in the law and unable and un-

qualified to represent or act for himself in a criminal proceeding; that at no time was he asked to waive his right to the assistance of counsel nor did he by word or act state or indicate that he waived, or intended to waive, that right; denies his guilt and denies that the evidence produced at trial showed his guilt.

Upon these pleadings the District Judge, after hearing argument, discharged the rule to show cause and dismissed the petition for the writ. The Circuit Court of Appeals affirmed.[1]

The petitioner contended in the Circuit Court of Appeals that the statute required the District Court to issue the writ and, upon his production in court, to hold a hearing on the issues made by the pleadings. The court found it unnecessary to pass on the contention, since it held "another manner of proceeding" (that here followed by the District Court) was permissible under our decisions. It approved the summary disposition of the case on the pleadings and affidavits submitted, as the petitioner had been afforded an opportunity to submit by affidavit whatever he deemed material. It thought the District Court was justified in disbelieving the petitioner's allegations and, on the basis of such disbelief, discharging the rule and denying the petition.

The case presents these questions: (1) Was the District Court, on the filing of the petition, bound forthwith to issue the writ and have the petitioner produced in answer to it? (2) If the procedure followed by the District Court was permissible, and the pleadings raised issues of fact, should those issues have been resolved by testimony rather than upon affidavits? (3) Did the pleadings raise any material issue of fact?

First. The statutes of the United States declare that the supreme court and the district courts shall have power to issue writs of *habeas corpus*;[2] that application for the writ shall be made to the court or justice or judge authorized to issue the same by complaint in writing, under oath, signed by the petitioner, setting forth the facts concerning his detention, in whose custody he is and by virtue of what claim or authority, if known.[3] The court or justice or judge "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto."

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[1] 109 F. (2d) 436.

[2] R. S. 751, 28 U. S. C. 451.

[3] R. S. 754, 28 U. S. C. 454.

The writ shall be directed to the person in whose custody the petitioner is detained.[4] The person to whom the writ is directed must certify to the court or judge the true cause of detention and, at the same time he makes his return, bring the body of the party before the judge who granted the writ.[5] When the writ is returned a day is to be set for the hearing, not exceeding five days thereafter, unless the petitioner requests a longer time.[6] The petitioner may deny the facts set forth in the return or may allege any other material facts, under oath.[7] The court or judge "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."[8]

It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause ~~to which the relator may respond.~~ By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court[9] and by the lower courts.[10] It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

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[4] R. S. 755, 28 U. S. C. 455.

[5] R. S. 757, 28 U. S. C. 457; R. S. 758, 28 U. S. C. 458.

[6] R. S. 759, 28 U S. C. 459.

[7] R. S. 760, 28 U. S. C. 460.

[8] R. S. 761, 28 U. S. C. 461.

[9] Ex parte Yarbrough, 110 U. S. 651, 653; Mooney *v.* Holohan, 294 U. S. 103, 111.

[10] Murdock *v.* Pollock, 229 Fed. 392.

Second. The District Court proceeded to adjudicate the petitioner's right to the writ upon the allegations of his petition and traverse and those of the return and accompanying affidavits. Thus the case was disposed of on *ex parte* affidavits and without the taking of testimony. The practice thus to dispose of applications for *habeas corpus* on matters of fact as well as of law has been followed in the Ninth and Tenth Circuits.[11]

In other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received.[12] This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed "to determine the facts of the case, by hearing the testimony and arguments". It is not a question what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.

As we said in *Johnson* v. *Zerbst,* 304 U. S. 458, 466, "Congress has expanded the rights of a petitioner for *habeas corpus* . . . There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* . . . it results that under the sections cited a prisoner in custody . . may have a judicial inquiry . . . into the very truth and substance of the causes of his detention. . . ." Such a judicial inquiry involves the reception of testimony, as the language of the statute shows.

The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's right to have those issues heard and determined in the manner the statute prescribes.

Third. Did the pleadings present any material issue of fact? The Government says they did not. It urges that, construed most favor-

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[11] Harpin *v.* Johnston, 109 F. (2d) 434; Franzeen *v.* Johnston, 111 F. (2d) 817; Walker *v.* Chitty, 112 F. (2d) 79; Zahn *v.* Hudspeth, 102 F. (2d) 759; Nivens *v.* Hudspeth, 105 F. (2d) 756; McCoy *v.* Hudspeth, 106 F. (2d) 810; McDonald *v.* Hudspeth, 108 F. (2d) 943; Moore *v.* Hudspeth, 110 F. (2d) 386; Taylor *v.* Hudspeth, 113 F. (2d) 825.

[12] Cundiff *v.* Nicholson, 107 F. (2d) 162; Hurt *v.* Zerbst, 97 F. (2d) 519; Brown *v.* Zerbst, 99 F. (2d) 745; Mothershead *v.* King, 112 F. (2d) 1004; Sanders *v.* Allen, 100 F. (2d) 717; Clawans *v.* Rives, 104 F. (2d) 240; United States *v.* Hiatt, 33 F. Supp. 545.

ably to petitioner, the allegations of the petition and the traverse do not show that he was in apparent or actual need of counsel's aid; and do disclose that he voluntarily waived the right to counsel.

Without repeating the allegations of the petition and traverse, which have been summarized above, we think it clear that, taken together, they overcome the presumption of regularity which the record of the trial imports and that, if the facts alleged were established by testimony to the satisfaction of the judge, they would support a conclusion that the petitioner desired the aid of counsel, and so informed the District Attorney, was ignorant of his right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel,[13] or if he was deceived or coerced by the prosecutor into entering a guilty plea,[14] he was deprived of a constitutional right. On a hearing he would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination *ore tenus* or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

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[13] Johnson *v.* Zerbst, 304 U. S. 458.

[14] Mooney *v.* Holohan, 294 U. S. 103.